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Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1999 TERM

MANUEL COSTA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Should this Court resolve the conflict between the Eleventh Circuit in the instant case, and other circuits as to whether ***Strickland v. Washington,*** 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and ***Hill v. Lockhart,*** 474 U.S. 52, 106 S.Ct 366, 88 L.Ed.2d 203 (1985), require a 2255 Petitioner who received gross misadvice regarding the potential length of his sentence to show that if the District Court granted his petition, that: (1) the Government and the Petitioner would enter into a plea agreement that would require the district court to impose sentence(s) more favorable (from a parole eligibility standpoint) than the sentences he is now serving, and (2) that the district court would accept the plea agreement and sentence him accordingly?

II. Whether a 2255 Petitioner is entitled to an evidentiary hearing, when the Government concedes that trial counsel was ineffective in failing to advise Petitioner under Title 42 U.S.C. § 4205, that if he went to trial, at sentencing the District Court could retard his parole eligibility from 10 years to 20 years, and where the Petitioner submitted his own affidavit stating that he would have plead guilty if properly advised,

and detailed sworn affidavits of others stating that before trial, he admitted his guilt to them, and that he would have plead guilty if he knew his parole eligibility could have been retarded from 10 to 20 years?

III. Where a 2255 Petitioner shows and the Government concedes that trial counsel was ineffective in failing to advise the Petitioner that the trial court could retard his parole eligibility under Title 42 U.S.C. § 4205, and thus require him to serve an additional 10 years of incarceration before being parole eligible, under ***Hill v. Lockhart,*** 474 U.S. 52, 106 S.Ct 366, 88 L.Ed.2d 203 (1985), is such evidence sufficient to satisfy the prejudice prong of ***Strickland v. Washington,*** 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)?

IV. Whether District Courts should fashion a remedy for a 2255 Petitioner requiring the Government to re-offer the prior plea offer, where the Government concedes that trial counsel was ineffective in failing to advise Petitioner that if he went to trial, at sentencing the District Court could retard his parole eligibility from 10 years to 20 years, and where affidavits Petitioner submitted showed that he admitted his guilt to others, sought plea negotiations, and rejected the Government's plea offer only because he

believed their was a small difference in his potential period of incarceration if he went to trial as opposed to pleading guilty?

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OPINIONS BELOW

The opinion and order denying petition for rehearing of the Court of Appeals for the Eleventh Circuit are unpublished opinions. Copies of the opinion and the order are appended hereto in the Appendix (hereinafter "Pet. App.") at 1 and 2 respectively. Prior to the opinion affirming the district court's order, the Eleventh Circuit entered an opinion granting a certificate of appealability.

The appeal to the Eleventh Circuit arose from a Order Denying Certificate of Appealability and a Final Order of Dismissal of Petitioner's motion to vacate, set aside or reduce sentence entered on May 12, 1998, by the Honorable William J. Zloch, United States District Court Judge, Southern District of Florida. Said Final Order affirmed a Report and Recommendation To District Judge entered on April 20, 1998, by the Honorable Barry Seltzer, United States Magistrate Judge. The foregoing orders are appended in Pet. App. at 5, 6, and 7 respectively.

The foregoing proceedings arose from the judgment and commitment order entered in the trial court on August 11, 1989, (Pet. App. at 54-58), and an opinion of the Court of Appeals for the Eleventh Circuit, entered on November 25, 1991, denying an appeal therefrom, reported at ***United States v. Manuel Costa, et al.,*** 947 F.2d 919 (11th Cir. 1991). *See,* Pet. App. at 26-49. An unpublished order entitled On Petition(s) for Rehearing and Suggestion(s) for

Rehearing En Banc subsequently denied such relief on January 27, 1992. *See,* Pet. App. at 50. Thereafter, this Court entered an Order on October 13, 1992, denying certiorari review, which is reported at 506 U.S.929, 113 S.Ct. 360, 121 L.Ed.2d 272 (1992)(White, Conner, *dissenting*). *See,* Pet. App. at 51-53.

JURISDICTION

The Judgment of the United States Court of Appeals for the Eleventh Circuit was entered on June 22, 1999. A timely Petition for Rehearing *En Banc*, as filed on July 12, 1999. On September 15, 1999, the Eleventh Circuit entered an order denying the Petition for Rehearing *En Banc*. Thereafter, October 1, 1999, the Eleventh Circuit issued a Mandate on its June 22, 1999 Judgment.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is conferred under Title 28 U.S.C. § 1254(1) and Sup.Ct. Rule 10.

CONSTITUTIONAL PROVISIONS & STATUTES

Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.

28 U.S.C. § 2255

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. . . .

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus....

Rule 8, 28 U.S.C.A. foll. § 2255

Rule 8. Evidentiary Hearing

(a) Determination by court. If the motion has not been dismissed at a previous stage in the proceeding, the judge, after the answer is filed and any transcripts or records of prior court actions in the matter are in his possession, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice dictates.

(b) Function of the magistrate.

(1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate may conduct hearings, including evidentiary hearings, on the motion, and submit to a judge of the court proposed findings and recommendations for disposition.

(2) The magistrate shall file proposed findings and recommendations . . . .

(4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.

18 U.S.C. § 4205 (a) and (b)

§ 4205. Time of eligibility for release on parole

(a) Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

(b) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine . . . .

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999.

No. _____

MANUEL COSTA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Manuel Costa, Defendant, Appellant and Petitioner in the courts below, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeal for the Eleventh Circuit entered in this case on June 22, 1991, and for which a Mandate issued on October 1, 1999.

STATEMENT OF THE CASE

A. *Basis for Federal Jurisdiction in District Court:*

The District Court was vested with jurisdiction pursuant to Title 28 U.S.C. § 2255 and the Sixth Amendment of the United States Constitution to entertain *Manuel Costa's* motion to vacate, set aside or correct a sentence, because such was imposed in violation of his right to effective assistance of counsel as guaranteed by the Sixth Amendment.

B. *Statement of Facts:*

• *Introduction:* This case raises several issues of national importance:

(1) The Eleventh Circuit, in affirming the denial of *Costa's* 2255 motion as well as his request for an evidentiary hearing, expanded the prejudice prong of ***Strickland*** to require the Petitioner to prove what would happen *after* a petition was granted on his behalf. The Eleventh Circuit held that *Costa's* petition and request for evidentiary hearing were denied because: (a) he failed to show that the Government presently would enter into a plea agreement with him that would require the district court to impose sentence(s) more favorable than the sentence he is now serving, and (b) that the district court would accept the plea agreement and sentence him accordingly. No other court has ever required a petitioner to satisfy this near impossible

burden, which would necessarily require the calling of the prosecutor and the district court judge as witnesses.

(2) Related to the above issue is whether the Eleventh Circuit improperly applied the above standard to deny the Petitioner an evidentiary hearing.

• *Proceedings Below:* On December 17, 1996, *Manuel Costa* filed a Petition to Vacate, Set Aside or Reduce Sentence Pursuant to Title 28 U.S.C. § 2255 and requested an evidentiary hearing (hereinafter "2255 Motion"). [Crim-D.E. 1031].

Costa's 2255 Motion alleged, *inter alia,* that his trial counsel was ineffective during plea bargaining stage before the trial court, because counsel failed to advise *Costa* that if he went to trial, the District Court could retard his parole eligibility from 10 to 20 years - thereby effectively lengthening the actual time he would have to serve in prison by approximately 10 years. [Crim-D.E. 1031]. *Costa's* motion was supported by affidavits from trial counsel, appellate counsel, his brother/co-defendant, two friends and himself.

The Government's Response conceded that counsel's advice was ineffective, but argued that *Costa* was not prejudiced because, contrary to the Affidavits supporting *Costa's* 2255 Motion, the Government maintained that *Costa* would not have plead guilty, and that if such a plea was made, it would have been an ***Alford*** type plea. The Government based its position solely upon a letter *Costa* submitted to the District

Court after trial and before sentencing in an effort to evoke leniency from the Court by pointing out weaknesses in the Government's case, and stating that his wife and children need him. [Crim-D.E. 1037].

Costa maintained in his Reply to the Government's Response that he had acknowledged his full guilt to his brother and close friend, prior to trial, and that his plea would not have been an ***Alford*** plea. [Civ-D.E. 3].

Thereafter, without first conducting an evidentiary hearing -- Magistrate Judge Seltzer issued a Report and Recommendation to the District Judge on April 17, 1998, recommending that *Costa's* Petition be denied. [R1-1051]. On April 30, 1998, *Costa* filed a Motion for Reconsideration of Report and Recommendation. [R1-1052].

Rather than referring the motion for reconsideration back to the Magistrate Judge, the District Court treated said motion for reconsideration as an "objection" to the Report and Recommendation, and entered a Final Order of Dismissal and Order Denying Certificate of Appealability on May 12, 1998. [Civ-D.E. 4,5]. *See,* Pet. App. at 5-7.

Costa filed a Notice of Appeal and a Petition with this Court for a Certificate of Appealability, which was granted on January 12, 1999, as to the issue raised concerning ineffective assistance of trial counsel.

After full briefing in this cause, the Eleventh Circuit entered an unpublished decision on June 22, 1999, affirming the District Court's ruling, based upon

the following reasoning:

> We find no error in the magistrate judge's analysis of the appellant's claim and his conclusion that appellant failed to satisfy the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984). Save appellant's bald allegations, there is nothing in the record that would permit the inference that, if appellant's multiple convictions were vacated and his not guilty pleas reinstated, (1) he and the Government would enter into a plea agreement that would require the district court (by effectively tying its hands) to impose sentence(s) more favorable (from a parole eligibility standpoint) than the sentences he is now serving, and (2) that the district court would accept the plea agreement and sentence him accordingly. In short, the appellant has failed to demonstrate that the outcome of his case would have been different but for counsel's ineffectiveness.

See, Pet. App. at 1-3.

A timely Petition for Rehearing *En Banc*, as filed on July 12, 1999. On September 15, 1999, the Eleventh Circuit entered an order denying the Petition

for Rehearing *En Banc. See,* Pet. App. at 4.

Thereafter, October 1, 1999, the Eleventh Circuit issued a Mandate on its June 22, 1999 Judgment.

ARGUMENT I

THE COURT BELOW, IN CONFLICT WITH THE OTHER CIRCUITS AND ITS OWN RULINGS, PLACED AN UNREASONABLE BURDEN UPON PETITIONER IN REQUIRING HIM TO SHOW THAT IF THE PETITION WAS GRANTED, (1) THE GOVERNMENT WOULD OFFER HIM A PLEA AGREEMENT WITH A LOWER PAROLE ELIGIBILITY DATE, AND (2) THE DISTRICT COURT WOULD ACCEPT THE PLEA AGREEMENT.

A. *No Court Has Required Such A Showing -- Even After an Evidentiary Hearing:*

In ***Hill v. Lockhart***, 474 U.S. 52, 106 S.Ct 366,

88 L.Ed.2d 203 (1985), this Court recognized that the ***Strickland***[1] test for ineffective assistance of counsel also applies to challenges to guilty pleas. This Court stated, *inter alia,* that in order to show prejudice, the petitioner must show that there is a "reasonable probability" that he would have not plead guilty and would have insisted on going to trial.[2]

Several Circuit Courts,[3] including the Eleventh

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[1] ***Strickland v. Washington,*** 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[2] Specifically, this Court stated:

> The . . . "prejudice," requirement . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

Hill, 474 U.S., at 56, 106 S.Ct., at 370.

[3] ***United States v. Gordon,*** 156 F.3d 376 (2nd Cir. 1998); ***Yarbrough v. United States,*** 51 F.3d 274 (6th Cir. 1995); and ***Iaea v. Sunn,*** 800 F.2d 861 (9th Cir. 1986). ***See also, Turner v. Tennessee,*** 858 F.2d 1201, 1208 (6th Cir. 1988) (requiring reinstatement of the original plea

Circuit,[4] have since applied ***Hill*** to ineffective assistance of counsel claims regarding gross misadvice regarding the potential length of the sentence if one goes to trial. However, none of the Circuits, with the exception of the Eleventh Circuit's opinion in the instant case, have required a petitioner to show that: (a) the Government presently would enter into a plea agreement with him that would require the district court to impose sentence(s) more favorable than the sentence he is now serving, and (b) that the district court would accept the plea agreement and sentence him accordingly.

In ***Coulter,*** the Eleventh Circuit specifically spelled out the showing necessary to support the claim the Petitioner raised herein. The Court, quoting this Court's opinion in ***Hill,*** stated:

> [t]he defendant must establish that

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offer unless the prosecution can show non-vindictive reasons for withdrawing the offer).

[4] ***Coulter v. Herring,*** 60 F.3d 1499 (11th Cir. 1995) (where a defendant decides not to take a plea, the failure to effectively advise a defendant regarding the consequences of taking a plea as opposed to going to trial may support a claim for ineffective assistance of counsel under ***Hill***), *cert denied,* 516 U.S. 1122 (1996); ***Yordon v. Dugger,*** 909 F.2d 474 (11th Cir. 1990); ***Holmes v. United States,*** 876 F.2d 1545 (11th Cir. 1989).

> "counsel's constitutionally ineffective performance affected the outcome of the plea process." In other words, in this instance, Coulter "must show that there is a reasonable probability that, but for counsel's errors, he would ... have pleaded guilty and would [not] have insisted on going to trial.

Coulter, 60 F.3d at 1503-04 (citations and footnote omitted)(added language in original).

B. ***The District Court Should Require the Government to Offer A Plea With a Lower Parole Eligibility Date or Re-Offer its Prior Plea In Order to Place the Petitioner Back in the Position He Would Have Been, Absent the Ineffective Assistance of Counsel:***

This Court has not yet addressed the issue of what remedy is appropriate where an accused, based upon counsel's advice, decides to go to trial rather than plead guilty, and such advice satisfies the ***Strickland*** test. The Ninth and Third Circuits have opined that the remedy that should be "tailored to the injury suffered." In ***United States v. Blaylock,*** 20 F.3d. 1458, 1468 (9th Cir. **1994),** the Ninth Circuit observed:

> Since the remedy for counsel's ineffective assistance should put the defendant back

> in the position he would have been if the Sixth Amendment violation had not occurred, in certain circumstances granting a new trial may not be the appropriate remedy. Several courts have recognized that where the ineffective assistance occurred before trial, as in cases where the harm consisted in defense counsel's failure "to communicate a plea offer to the defendant, .. [granting a] subsequent fair trial does not remedy this deprivation...."

Blaylock, 20 F.2d. at 1468 (citations omitted).

However, in the instant case, the Eleventh Circuit's holding showed that the court would not require the Government to re-offer the prior plea, or even a plea that would remedy the harm suffered by deleting the parole eligibility retardation provision from *Costa's* Judgment and Commitment.

Merely granting of a new trial, does not remedy the harm suffered. Requiring the Government to reinstate its original plea offer is constitutionally permissible, and not obviated by intervening circumstances. ***See, Mabry v. Johnson,*** 467 U.S. 504, 510, n. 11, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984) and ***United States v. Morrison,*** 449 U.S. 361, 364, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981). ***See also, Turner v. Tennessee,*** 858 F.2d 1201, 1208 (6th Cir. 1988)(requiring reinstatement of the original plea offer

unless the prosecution can show non-vindictive reasons for withdrawing the offer).

Furthermore, requiring the Government to reinstate its original offer would also accommodate the policy the Supreme Court articulated in ***Kimmelman v. Morrison,*** 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986), where the Court held: "[t]he Constitution constrains our ability to allocate as we see fit [or the Government] bear the risk of constitutionally deficient assistance of counsel." 477 U.S. at 379, 106 S.Ct. at 2585. Thus, under ***Kimmelman,*** the risk of ineffective assistance of counsel should not be shifted to *Costa* by ordering a new trial or requiring him to prove that the District Court or the Government would reinstate the original plea offer -- after both have contested the relief he has sought.

Therefore, *Costa* urges this Court fashion a remedy for such petitioners, requiring the district courts to place them back in the position they would have been if the Sixth Amendment violation had not occurred - - by allowing the petitioner(s) to plead guilty in accordance with the plea agreement, or for the judgment and commitment to be modified to remedy the prejudice suffered.

ARGUMENT II

THE COURT BELOW ERRED IN DENYING *COSTA* AN EVIDENTIARY HEARING, BASED UPON A LACK OF SHOWING THAT IF THE PETITION WERE GRANTED, THE GOVERNMENT WOULD REINSTATE THE PRIOR PLEA OFFER OR A PLEA WITH NO PAROLE RETARDATION PROVISION.

Costa's 2255 Motion was denied without an evidentiary hearing, and his appeal simply challenged the denial of an evidentiary hearing.

Title 28 U.S.C. § 2255 provides that "[u]nless the motion and the files and records of the case ***conclusively show*** that the prisoner is entitled to no relief, the court ***shall*** . . . grant a prompt hearing thereon." *Id.* (emphasis added).

In ***Machibroda v. United States,*** 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed.2d 473 (1962), this Court considered this issue in the context of a Federal Prisoner's allegations that his pleas of guilty had not been voluntary, but were induced by promises of the prosecutor as to the length of his sentence. Like the instant case, the district court denied the petition without a hearing, and the court of appeals affirmed.

This Court, after noting the detailed facts alleged in the petition, held:

> We think the District Court did not proceed in conformity with the provisions of 28 U.S.C. s 2255, 28 U.S.C.A. s 2255, *when it made findings on controverted issues of fact without notice to the petitioner and without a hearing*. ***United States v. Hayman***, 342 U.S. 205, 220, 72 S.Ct. 263, 96 L.Ed. 232 (1951). The statute requires a District Court to 'grant a prompt hearing' when such a motion is filed, and to 'determine the issues and make findings of fact and conclusions of law with respect thereto' unless 'the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief. This was not a case where the issues raised by the motion were conclusively determined either by the motion itself or by the 'files and records' in the trial court. The factual allegations contained in the petitioner's motion and affidavit, and put in issue by the affidavit filed with the Government's response, related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light. Nor were the circumstances alleged of a

> kind that the District Judge could completely resolve by drawing upon his own personal knowledge or recollection.....

Machibroda v. United States, 368 U.S. 494-95, 82 S.Ct., at 513-14. (emphasis added).[5]

As argued above, however, the District Court and the Eleventh Circuit relied upon conclusions for which no sworn testimony exists in the Record. *Costa* never conceded that he would *not* have plead guilty had he been properly advised of the potential sentence herein if he went to trial, and it is uncontroverted that the effect of counsel's ineffectiveness is an additional four to ten years incarceration.[6] Further, in accordance with the tests set forth in ***Hill v. Lockhart*** and ***Coulter,*** as

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[5] ***See also, Townsend v. Sain,*** 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963)(petitioner is entitled to an evidentiary hearing *if he alleges facts which, if proven, would entitle him to relief*); *see, e.g.,* ***Futch v. Dugger,*** 874 F.2d 1483 (11th Cir. 1989) ***Ladd v. Jones,*** 864 F.2d 108 (11th Cir.1989)(per curiam).

[6] The Government's plea offer provided for a maximum term of 16 years incarceration, which would have resulted in *Costa* being parole eligible after 10 years incarceration. However, under the present sentence, *Costa* is not parole eligible until after service of 20 years incarceration.

argued in this Petition, *Costa's* 2255 Motion satisfied both prongs of ***Strickland.*** Accordingly, the lower courts erred in denying *Manuel Costa* an evidentiary hearing.

CONCLUSION

For all the foregoing reasons, therefore, *Manuel Costa* respectfully submits that this Court should grant this Petition for Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed *via* U.S. Mail, this 14th day of December, 1999, to: ***Solicitor General,*** Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530; ***Karen Atkinson, Esq.,*** Assistant U. S. Attorney, 500 Australian Avenue, 4th Floor, West Palm Beach, FL 33401, and to the ***Office of the U. S. Attorney, Appellate Division,*** Attn: Kathleen M. Salyer, Esq., 99 N.E. 4th Street, Miami, FL 33130.

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(2) Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO. _____

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OCTOBER, 1999 TERM

MANUEL COSTA,

Petitioner,

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APPENDIX TO PETITION FOR CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed *via* U.S. Mail, this 14th day of December, 1999, to: ***Solicitor General,*** Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530; ***Karen Atkinson, Esq.,*** Assistant U. S. Attorney, 500 Australian Avenue, 4th Floor, West Palm Beach, FL 33401, and to the ***Office of the U. S. Attorney, Appellate Division,*** Attn: Kathleen M. Salyer, Esq., 99 N.E. 4th Street, Miami, FL 33130.

RHONDA A. ANDERSON, ESQ.
Rhonda A. Anderson, P.A.
Counsel for *Manuel Costa*
2420 Coral Way
Miami, Florida 33145
Florida Bar No. 708038
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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4810
Non-Argument Calendar
District Court Docket Nos. 96-8865-CV-WJZ
and 87-8021-CR-WJZ

MANUEL COSTA,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Before TJOFLAT, COX and MARCUS, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court in This cause be and the same is hereby AFFIRMED.

ENTERED: June 22, 1999
For the Court: Thomas K. Kahn, Clerk

By: Matt Davidson s/s
Deputy Clerk

ISSUED AS MANDATE: OCT. 01, 1999

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4810
Non-Argument Calendar
District Court Docket Nos. 96-8865-CV-WJZ
and 87-8021-CR-WJZ

MANUEL COSTA,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(June 22, 1999)

Before TJOFLAT, COX and MARCUS, Circuit Judges.

PER CURIAM:

We granted a certificate of appealability in this case on one issue: whether appellant's trial counsel rendered ineffective assistance of counsel in advising appellant to plead not guilty and to proceed to trial. The district court denied relief on appellant's ineffective assistance claim on the basis of the report and recommendation of a magistrate judge, which the court adopted.

We find no error in the magistrate judge's analysis of appellant's claim and his conclusion that appellant failed to satisfy the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984). Save appellant's bald allegations, there is nothing in the record that would permit the inference that, if appellant's multiple convictions were vacated and his not guilty pleas reinstated, (1) he and the Government would enter into a plea agreement that would require the district court (by ineffectively tying its hands) to impose sentence(s) more favorable (from a parole eligibility standpoint) than the sentences he is now serving, and (2) that the district court would accept the plea agreement and sentence him accordingly. In short, appellant has failed to demonstrate that the outcome of his case would have been different but for counsel's ineffectiveness.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4810

MANUEL COSTA,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ___F.2d____).

Before TJOFLAT, COX and MARCUS, Circuit Judges.
PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.
ENTERED FOR THE COURT:

_____
UNITED STATES CIRCUIT JUDGE
Entered: September 15, 1999

ORD-42
(6/95)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 96-8865-CIV-ZLOCH
87-8021-CR-ZLOCH

MANUEL COSTA,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER DENYING CERTIFICATE OF APPEALABILITY

THIS MATTER is before the Court sua sponte, and the Court having denied Movant's Petition To Vacate, Set Aside, Or Reduce Sentence, finds that the Movant has failed to take a substantial showing of the denial of a constitutional right as required by 28 U.S.C. §2253(c)(2)(1).

Accordingly, it is

ORDERED AND ADJUDGED that the issuance of a Certificate of Appealability be and the same is hereby **DENIED** for the reasons set forth above.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 12th day of May, 1998.

_____
WILLIAM J. ZLOCH
United States District Judge

Copies furnished:
Rhonda Anderson, Esq.
Arturo Hernandez, Esq., For Movant
Karen Atkinson, Esq., AUSA, For Respondent

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 96-8865-CIV-ZLOCH
87-8021-CR-ZLOCH

MANUEL COSTA,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

FINAL ORDER OF DISMISSAL

THIS MATTER is before the Court upon the Report And recommendation To District Judge (DE 1051), filed herein by United States Magistrate Judge Barry S. Seltzer, on April 20, 1998, and upon the Movant's Objections thereto contained in his Motion For reconsideration Of Report and Recommendation To District Judge (DE 1052).

The Court has conducted a de novo review of the entire record herein and after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. Movant, Manuel Costa's Objections to said Report and Recommendation contained in his Motion For Reconsideration Of Report and Recommendation To District Judge (DE 1052) be and the same are hereby **OVERRULED**;

2. The Report and Recommendation To District Judge (DE 1051), filed herein by United States Magistrate Judge Barry S. Seltzer, be and the same is hereby approved, adopted and ratified by the Court;

3. The Petition To Vacate, Set Aside, Or Reduce Sentence filed herein by Movant be and the same is hereby

DENIED;

4. The above-styled cause be and the same is hereby **DISMISSED**; and

5. To the extent not otherwise disposed of herein, all pending motions are hereby **DENIED** as moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 12th day of May, 1998.

WILLIAM J. ZLOCH
United States District Judge

Copies furnished:

The Honorable Barry S. Seltzer
United States Magistrate Judge

Rhonda Anderson, Esq.
Arturo Hernandez, Esq.
For Movant

Karen Atkinson, Esq., AUSA
For Respondent

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 96-8865-CIV-ZLOCH
87-8021-CR-ZLOCH

MANUEL COSTA,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT AND RECOMMENDATION TO DISTRICT JUDGE

THIS CAUSE is before the Court upon the Petition to Vacate, Set Aside, or Reduce Sentence Pursuant to Title 28 U.S.C. § 2255, Request for Evidentiary Hearing, and Incorporated Memorandum of Law filed by Manuel Costa, and was referred to United States Magistrate Judge Barry S. Seltzer pursuant to the provisions of 28 U.S.C. § 636 and Rule l(e) of the Magistrate Rules of the United States District Court for the Southern District of Florida. For the following reasons, the undersigned RECOMMENDS that the Petition be DENIED.

I. PROCEDURAL HISTORY

On March 3,1987, a federal grand jury returned a fifteen count Indictment, charging fourteen individuals with various narcotics crimes (DE 1). On May 12, 1987, the grand jury returned a Superseding Indictment, adding a defendant and several counts (DE 121). On August 30,1988, the grand jury returned a second Superseding Indictment, adding Manuel Costa and five other defendants and deleting counts to which another co-defendant had pled guilty (DE 469). The second Superseding Indictment charged Costa with six cocaine trafficking offenses

occurring in or about November 1984 through July 1985: one count of conspiracy to possess with intent to distribute cocaine; one count of conspiracy to import cocaine,- and four (substantive) counts of importing cocaine.

On May 2, 1989, Costa commenced trial before the Honorable William J. Zloch. The trial proceeded intermittently until June 8, 1989, when the jury returned a verdict of guilty against Costa on all counts (DE 684).

On August 11, 1989, Judge Zloch sentenced Costa to a sixty year term of incarceration: two, concurrent twenty years terms on each of the conspiracy counts followed by four consecutive ten year terms on each of the substantive counts. Pursuant to 18 U.S.C. § 4205(b)(1), the judge then ordered that Costa not be eligible for parole until he had served one-third (twenty years) of his sixty year sentence (DE 738).

Thereafter, Costa appealed his conviction and sentence, raising the following issues: 1) whether the District Court abused its discretion in admitting certain 404(b) evidence; 2) whether the District Court erred in limiting the testimony of a defense witness; 3) whether the District Court erred in limiting the cross-examination of a Government witness; 4) whether the District Court erred in denying a motion for mistrial for violation of the sequestration rule; 5) whether the District Court properly imposed consecutive sentences on three of the substantive (importation) counts; and 6) whether the District Court lawfully invoked § 4205 to retard parole eligibility until completion of one-third of the sentence.

On November 25, 1991, the Court of Appeals affirmed Costa's conviction (DE 918).. Costa petitioned for a rehearing or a rehearing en banc; his petition was denied.

In May 1992, Costa petitioned the United States Supreme Court for a writ of certiorari; that petition was similarly denied. See United States v. Costa, 947 F.2d 919 (11th Cir. 1991), cert. denied, 506 U.S. 929,113 S.Ct. 360, 121 L.Ed. 2d 272 (1992).

On February 8, 1993, Costa filed a Motion for Reduction of Sentence, which was denied on February 18, 1993 (DE 952, 955). On December 17, 1996, Costa filed the instant Petition to Vacate, Set Aside, or Reduce Sentence Pursuant to Title 28 U.S.C. § 2255 (DE 1031). On July 30, 1997, the Government filed its response (DE 1037), and on November7,1997, Costa replied thereto (DE).[1]

II. PETITION TO VACATE, SET ASIDE, OR REDUCE SENTENCE

Costa claims four errors in his § 2255 petition: 1) the Court imposed a sentence contrary to the legislative history of 18 U.S.C. § 4205, delaying parole eligibility until one-third of the sentence had been served; 2) the Court failed to state whether the conspiracy statute under which it sentenced Costa carried a statutory minimum; 3) the Court wrongfully imposed a twenty year sentence for violations of 21 U.S.C. §§ 846 and 963; and 4) counsel rendered ineffective assistance during plea bargaining. Costa's first three arguments fail on procedural grounds. Costa's fourth argument fails because he cannot show that he was prejudiced by counsel's allegedly ineffective assistance.

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1 Costa's Reply was not docketed in the criminal case file (87-8021-Cr-Zloch); it was docketed only in the corresponding civil case file (96-8865-Civ-Zloch) at entry 3.

Costa first contends that the Court's invocation of §4205 to retard his parole eligibility until completion of one-third of his sentence contravenes that statute's legislative history. A movant, however, may not utilize a §2255 proceeding to relitigate issues that were previously raised and rejected on direct appeal. Cabrera v. United States, 972 F.2d 23, 25 (2nd Cir. 1992); United States v. Rowan, 663 F.2d 1034, 1035 (11th Cir. 1981). Costa had raised this same argument on direct appeal, and it was rejected. He acknowledges the procedural bar to relitigating this issue but explains that he again raised the argument on the chance the law might have changed during the pendency of these proceedings. Costa, however, has not cited to any change in the law.

Costa further contends that the District Court erred in imposing a twenty year sentence on the narcotics conspiracy counts without stating whether it believed such sentence to be the statutory minimum. In addition, he suggests that twenty years was not the maximum authorized sentence for narcotics conspiracies under 21 U.S.C. § 846 and 963. Costa, however, did not raise these arguments on direct appeal. A movant may not later utilize a § 2255 proceeding to raise claims that he failed to present on direct appeal, Greene v. United States, 880 F.2d 1299, 1305 (11th Cir. 1989), unless he can show both cause excusing the failure to raise such claims previously and actual prejudice resulting therefrom. Cross v. United States, 893 F.2d 1287,1289 (11th Cir.), cert. denied, 498 U.S. 849, 111 S.Ct. 138, 112 L.Ed.2d 105 (1990); Parks v. United States, 832 F.2d 1244, 1245 (11th Cir. 1987). To establish legal "cause" to excuse a procedural default, a movant must demonstrate that "some objective factor

external to the defense impeded his counsel's efforts to raise the claim," Pifts v. Cook, 923 F.2d 1568, 1571 (11th Cir. 1991), or that his attorney's performance failed to meet the Supreme Court's standard for effective assistance of counsel. Reese v. United States, 119 F.3d 1462, 1465 (11th Cir. 1997)(citing Murray v. Carrier, 477 U.S. 478,488,106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986)).

Costa has not shown that any objective factor external to the defense impeded his counsel's efforts to raise his arguments concerning either the minimum or maximum sentences. In his Reply, Costa suggests (for the first time) that his claim should not be procedurally barred "because his appellate counsel's failure to raise the issue may constitute cause." See Reply, p.8 (DE 3) (emphasis added). But Costa offers no argument to support a conclusion that appellate counsel's failure to raise these claims constitutes legal cause excusing the procedural default .[2]

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2 Indeed, appellate counsel would have been without a basis to raise either of these claims on direct appeal. Costa's argument that the Court erred in failing to state whether it believed the twenty year conspiracy sentence to be the statutory minimum makes no sense either legally or factually. Costa was sentenced on conspiracies that occurred in 1985, at which time the conspiracy statutes (21 U.S.C. §§ 841 and 960) carried no mandatory minimum sentence. Costa cites United States v. Giltner 889 F.2d 1004 (11th Cir. 1989), for the proposition that this Circuit requires a trial court to articulate whether or not it was imposing a minimum sentence or whether or not a minimum sentence was required by law. Giltner, however, arose out of a sentencing wherein the trial judge expressed his mistaken belief that the governing statute carried a five year mandatory minimum. Concerned that the trial judge's mistaken belief may have affected the sentence imposed, the appellate court remanded the matter for resentencing. But in the

The only claim warranting review on the merits is that counsel rendered ineffective assistance during plea bargaining.[3] This claim arises out of counsel's advice concerning parole eligibility. According to Costa's affidavit, counsel informed him that if he accepted the Government's plea offer, he would be sentenced to sixteen years, would likely be eligible for parole after eight and one-half to nine and one-half years, and, in any event, would be eligible for parole after no more than ten years.

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instant matter, Judge Zloch never expressed a mistaken belief that the conspiracy statute under which he sentenced Costa carried a particular mandatory minimum. And the Judge was under no obligation to state on the record that the statute did not carry a mandatory minimum sentence.

Costa's suggestion that the Court erred in imposing a twenty year sentence on the conspiracy convictions is similarly flawed. In 1985, the substantive narcotics statutes, 21 U.S.C. §§ 841 and 960, provided that in a case of a violation involving a kilogram or more of cocaine, "such person shall be sentenced to a term of imprisonment of not more than twenty years. . . ." And the corresponding conspiracy statutes, 21 U.S.C. §§ 846 and 963, stated that "any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum prescribed for the offense, the commission of which was the object of the attempt or conspiracy." Because the trial judge was authorized to sentence Costa up to twenty years on the underlying substantive violation, he was authorized to do the same on the corresponding conspiracy violation.

3 Costa seeks relief from this alleged violation by being allowed now to plead guilty in accordance with the plea agreement and to be sentenced to a maximum of sixteen years incarceration. See Petition, p. 27 (DE 1031).

Counsel further told him that if he went to trial and were sentenced to more than thirty years, he would be eligible for parole after ten years. Costa avers that he rejected the plea offer because he would be gambling only one year by going to trial. See Petition and Affidavit of Manuel Costa (DE 1031).

Trial counsel's affidavit is consistent. Counsel avers that he told Costa he would be eligible for parole after serving one-third of his sentence and that sentences of thirty years or more are treated as only thirty year sentences for calculating parole eligibility. Counsel informed Costa that were he to accept the Government's sixteen year plea offer that (notwithstanding his parole eligibility) the Parole Guidelines would likely result in his serving eleven years. Counsel further told Costa that were he to proceed to trial and be convicted he would likely be sentenced to a fifty to sixty year term (which would be treated as a thirty year term for calculating parole eligibility). Under this scenario, he would be eligible for parole after serving ten years, although pursuant to the Parole Guidelines he would likely serve thirteen to fourteen years. Counsel avers that Costa elected to proceed to trial because the difference in time to be served on a plea and on a trial conviction would be only two years. Finally, counsel avers that Costa was convicted following trial and sentenced to sixty years with the condition that he serve at least one-third (twenty years) of the sixty year term before being eligible for parole. Counsel represents that he never informed Costa that his parole eligibility might be delayed beyond ten years. Costa's ineffective assistance of counsel claim is predicated upon this omission.

In Strickland v. Washington, 466 U.S. 668, 686,104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the Supreme Court held that "the proper standard attorney performance is that of reasonably effective assistance." Id. at 686, 104 S.Ct. at 2064. Under the Strickland standard, a movant alleging ineffective assistance must show not only that his counsel's representation fell below an objective standard of reasonableness, but also that he suffered actual and substantial prejudice as a result. Wiley v. Wainwright, 709 F.2d 1412, 1413 (11th Cir. 1983). A court, however, need not "address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland. 446 U.S. at 697, 104 S.Ct. at 2069. As the Supreme court has stated, a court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.... If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which ... will often be so, that course should be followed." Id. To determine whether a defendant has shown prejudice, a court must decide whether, "but for counsel's unprofessional errors, the result of the proceeding would have been different." Cave v. Singletary, 971 F.2d 1513, 1517 (11th Cir. 1 992).

In Hill v. Lockhart, 474 U.S. 52,106 S.Ct. 366, 88 L.Ed.2d 203 (1985), the Supreme Court applied the Strickland test to a challenge to a guilty plea based on ineffective assistance of counsel. The Court stated that in such a context a movant could satisfy the prejudice prong of the test by demonstrating that, but for counsel's deficient performance, a reasonable probability exists that the movant would not have pled guilty and would have instead

demanded a trial. Id. at 59, 106 S.Ct. at 370. Thereafter, this Circuit extended the Frill analysis to movants who had declined plea offers and proceeded to trial. Coulter v. Herring, 60 F.3d 1499, 1504 n.7 (11th Cir. 1995), cert. denied, 516 U.S. 1122, 116 S.Ct. 934, 133 L.Ed.2d 860 (1996). "[I]n this instance, [a movant] 'must show that there is a reasonable probability that, but for counsel's errors, he would ... have pleaded guilty and would [not] have insisted on going to trial.'" Id. at 1504 (citation omitted).

Assuming arguendo that the allegations contained in the affidavits of Costa and counsel are true,[4] Costa suffered no prejudice. Costa can not show that there is a reasonable probability that, but for counsel's advice, he would have pled guilty rather than proceed to trial. Indeed, Costa could not then have entered (and can not now enter) a guilty plea before this Court because he affirmatively represented to the judge that he is innocent of the offenses charged. Costa made his claim of innocence in a personal letter to the District Judge prior to sentencing. He sought to persuade the District Judge that the Government's witnesses had "all lied about [him]." See August 10, 1989

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4 The undersigned finds that an evidentiary hearing is not warranted because the Petition can be determined on the record before the Court. See Yeaman v. United States, 326 F.2d 293, 294 (9th Cir. 1963). Even were the undersigned to view the affidavits in the light most favorable to Costa, he suffered no prejudice. See Hill, 474 U.S. at 60, 106 S.Ct. at 371 ("Because petitioner in this case failed to allege the kind of 'prejudice' necessary to satisfy the second half of the Strickland v. Washington test, the District Court did not err in declining to hold a hearing on petitioner's ineffective assistance of counsel claim.").

letter (attached). Costa now seeks to characterize that letter merely as a critique of the Government's case. See Reply, p.5 (DE 3). But this belated characterization is contradicted by his own attorney's statement to the District Judge at sentencing.

> Mr. Costa's position has been that he is not guilty and the Government witnesses lied about him. I think he maintains that position based upon the letter which I read last night, which is a copy of that which the Court received.

See Sentencing Transcript (attached) (emphasis added). In this context, counsel was not invoking the term "not guilty" as a pre-trial plea to trigger the Government's trial production and persuasion burdens. Rather, he was claiming factual innocence in mitigation of sentence.

The Government contends that where a defendant proclaims his innocence to a court, he can not then enter a guilty plea; therefore, he can not be prejudiced by counsel's advice regarding certain collateral consequences of that plea. The Government's contention is not technically correct. Although Federal Rule of Criminal Procedure 11, which governs the acceptance of pleas, does not specifically address the issue of whether a judge may accept a plea where there exists a factual basis for the plea but the defendant asserts his innocence, the Advisory Committee Notes accompanying the 1974 Amendment state that "[t]he procedure in such a case would seem to be to deal with this as a plea of nolo contenders, the acceptance of which would depend upon the judge's decision as to whether acceptance of the plea is consistent with 'the interest of the public in the effective administration of justice'. . . ." (emphasis added) See also

North Carolina v. Afford, 400 U.S. 25, 37, 91 S.Ct. 160, 167, 27 L.Ed.2d 162 (1970) (a trial judge may find a factual basis to accept a plea from Government attorneys or from the presentence report even where a defendant asserts his innocence). Whether a defendant who maintains his innocence will be permitted to enter a change of plea will therefore depend upon the presiding judge's practice concerning nolo contenders pleas.

The Government had offered Costa the opportunity to plead "guilty," not to plead nolo contenders. Furthermore, the undersigned understands that the presiding judge in this case - the Honorable William J. Zloch - has a practice of accepting only guilty pleas wherein the defendant affirmatively acknowledges guilty; he does not accept Alford or nolo contenders pleas.[5] Because the District Judge would not accept, and the United States Attorney did not assent to, any plea agreement wherein a defendant refuses to acknowledge his guilt, Costa (by affirmatively asserting his innocence) could not then have entered - and could not now enter - a guilty plea before this Court. He, therefore, can not show that he was prejudiced by counsel's advice.

III. CONCLUSION

For the foregoing reasons, it is respectfully RECOMMENDED that the Petition be DENIED.

The parties will have ten (10) days from the date of

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5 If the undersigned is mistaken as to his understanding of the District Judge's practice, then the undersigned would RECOMMEND that the Court OVERRULE this Report and Recommendation and REMAND the matter to consider whether counsel's advice fell below an objective standard of reasonableness.

being served with a copy of this Report and Recommendation within which to file written objections, if any, with the Honorable William J. Zloch, United States District Judge. Failure to file objections timely shall bar the parties from a de novo determination by the district judge of an issue covered in the report and shall bar the parties from attacking on appeal factual findings accepted or adopted by the district court except upon grounds of plain error or manifest injustice. See 28 U.S.C. § 636(b)(1); Nettles v. Wainwright, 677 F.2d 404, 410 (5th Cir. Unit B 1982)(en banc).

DONE AND SUBMITTED at Fort Lauderdale, Florida, this 17th day of April 1998.

BARRY SELTZER
United States Magistrate Judge

Copies to:
Honorable William J. Zloch
United States District Judge

Karen Atkinson, Esquire
Assistant United States Attorney

Rhonda Anderson, Esquire
Arturo Hernandez, Esquire
2420 Coral Way
Miami, Florida 33145-3410
Attorneys for Defendant

August 10, 1989

Honorable William J. Zloch
U.S. District Court Judge
299 East Broward Boulevard
Ft. Lauderdale, Florida 33301

Re: United States of America v. Manuel Jose Costa, Case No. 87-8021-CR-Zlock

Dear Judge Zloch:

I am writing you this letter without the consent of my lawyers because I think it is most important.

I did not get indicted until September of 1988 in a supercedes indictment. The only Grand Jury witness was Agent Carl J. Kotowski from DEA who got all the information from Carmen Roberto who I did not meet until 1986 in the Dominican Republic with my brother, who was involved and plead guilty. Carmen Roberto as you know was playing the name game, helping the Government in indicting as many people as he could, getting brownie points with DEA. For instance, in one of his testimonies up north he bragged that his judge was going to be very happy that he got my ranch and horses seized. Ironically for him, Judge Scott in Miami returned to me all of my property and my horses. Obviously, Judge Scott realized that they were all legal and not bought with drug monies.

The only witness who ties me to the four counts in the January loan is Carmen Roberto and you heard him and

you know where he is coming from. He put me in the Delray house even though he not know where the house was he said the house was in Pompano or Deerfield beach,

. . . . . .

which are 20 miles apart, and he is the only one who said that I paid him. I was not at Freeport nor at the that house which had so many different locations (Boca Raton, Pompano & Deerfield Beach). Roberto did not know where the house was until the DEA told him and I sure did not give him any money. I met him a year later, after the incident in the "Delray house".

In the February load Frank San Pedro, who was not indicted in this case and is testifying against anyone he can to get out of jail through a Rule 35, said he heard me on the radio but Elisworth who could not ID me in court and John Hanlon, who lied so much about Paul Kent, said the radio was broken and there was no way anyone could use it.

In February 17th, I came with a female friend from Bimini, not from Abacos. It is on the customs card. And, at the Doll House everyone except Roberto said I was 40/45 years old, 6 ft. tall and 190 lbs., and that I did not take deliver of any Kilos or any cars that were loaded.

Concerning the incident in Spanish Key, you heard all the lies Hanlon said about Paul Kent in his ore-trial detention hearing by saying that Kent was at the dock in Boca Raton

with a machine gun with a banana clip and Cars of Quality carrying boxes of cocaine when in fact Kent was in England. Consequently, Kent served 15 months of pre-trial detention without bond due to the accusations brought up by the individuals who testified against me and eventually was released when all drug charges were dropped.

. . . . . .

Pat Elisworth in court said I was Jorge Rodriguez. 7 of the 10 witnesses did not know what I looked like. Yet, they all lied about me. You know that Roberto told them what to say. Who better then a bunch of Latins to pass the bucket to help him get out of jail.

About the 404B material, Allen English, who protected his wife, brother and others, and said he would say anything to get a low sentence and not lose his properties, claimed to know me since 1979. Claimed he worked with me in 1979, 1980, 1983, 1984 and 1985 and at the same time walked around "Your Courtroom" and said I was not there.

When the jury went to deliberate, I went to Agent Kotowski and shock his hand and told him that whether I won or lost I did not have anything against him; that I understood he was just doing his job and that I wished we would have met under different circumstances. He in return stated that he felt the same way, wished me the best of luck and said I was "ok". He also addressed me and asked me if he and his son could go to my ranch to ride

horses with me and my son Manny and I said sure.

If the agent who went to my house and my farm and investigated me is willing to take his son to my ranch, obviously, he does not think I am dangerous.

I have a wife and 4 kids. She cannot run my business while I am in jail. I am needed very much at home. Please be lenient and put me in house arrest, probation or on appeal bond and give me as many community hours as you desire so that I can take care of my loved ones. I was out on bond for 8 months and I did not violate my pre-trial probation.

. . . . . .

I am not dangerous and I am not a flight risk.

Respectfully,

Manuel Jose Costa

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 87-8021-CR-ZLOCH

UNITED STATES OF AMERICA,
v.
MANUEL COSTA.
_____/

TRANSCRIPT OF PROCEEDINGS HAD BEFORE THE HONORABLE WILLIAM J. ZLOCH, U.S. DISTRICT JUDGE, IN FORT LAUDERDALE, BROWARD COUNTY, FLORIDA, ON FRIDAY, AUGUST 11, 1989, IN THE ABOVE-STYLED ACTION.

APPERANCES OF COUNSEL:
FOR THE GOVERNMENT:

KAREN ATKINSON, ESQ.
ASSISTANT U.S. ATTORNEY

FOR THE DEFENDANT:

PAUL LAZARUS, ESQ.

CARL SCHANZLEH
OFFICIAL COURT REPORTER
U.S. COURTHOUSE
299 E. BROWARD BLVD., 202B
FORT LAUDERDALE, FLORIDA 33301

The letters of reference were much shorter than I had anticipated. So the court had an opportunity to peruse all of the letters.

These letters will be made a permanent part of the presentence investigation report of Mr. Costa.

Mr. Lazarus: Thank you, your Honor.

THE COURT: Stand the defendant at the podium. Any legal cause why sentence should not now be imposed?

MR. LAZARUS: No, your Honor.

THE COURT: all right, no legal cause having been shown as to why sentence should not now be imposed, the court will receive whatever information or evidence may be offered in extenuation or in mitigation of punishment, or which is otherwise relevant to the sentence to be here imposed.

Mr. Lazarus: you may proceed, sir.

MR. LAZARUS: Your Honor, I have some remarks I would like to address to the court.

Your Honor, Mr. Costa's position has been that he is not guilty and the government witnesses lied about him. I think he maintains that position based upon the letter which I read last night, which is a copy of that which the court received. I am not here to relitigate any issues before this court. I understand how the system works.

The jury has spoke, and your Honor, in fulfilling

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947 F.2d 919, U.S. v. Costa, (C.A.11 (Fla.) 1991)
*919 947 F.2d 919
34 Fed. R. Evid. Serv. 896

UNITED STATES of America, Plaintiff-Appellee,

v.

Manuel COSTA, Debra Maxine Perry, Rene Totorica Nunez,

Defendants-Appellants.

No. 89-5874.

United States Court of Appeals,

Eleventh Circuit.

Nov. 25, 1991.

T, COX and MARCUS, Circuit Judges.

Following jury trial before the United States District Court for the Southern District of Florida, No. 87-8021-CR-WJZ, William J. Zloch, J., defendants were convicted of various drug trafficking offenses. Defendants appealed. The Court of Appeals, Johnson, Senior Circuit Judge, held that: (1) exclusion of portion of defense witness' exculpatory testimony, to effect that he had not encountered defendants in connection with his various smuggling activities with prosecution witnesses, was not abuse of discretion; (2) admission of extrinsic evidence of prior drug smuggling by defendants on issue of their intent was proper where defendants did not stipulate that they possessed requisite intent; and (3) defendants' three convictions for importing cocaine in three separate vessels did not constitute multiplicitous convictions for same offense.

Affirmed.

1. CONSPIRACY k45
91II Criminal Responsibility
91k44 Evidence
91k45 Admissibility in general.
110k673(5) Limiting effect of evidence of other offenses.

In most instances, district court should admit evidence that may or may not relate to indicted conspiracy with appropriate limiting instruction to effect that jury may consider evidence only if it finds that evidence relates to indicted conspiracy, rather than to separate, unrelated conspiracy; jury, as ultimate fact finder, should be provided with all relevant information, especially when such information bears on ultimate guilt or innocence of accused.

2. CONSPIRACY k48.1(1)
91II Criminal Responsibility
91k48 Trial
91k48.1 Questions for Jury
91k48.1(1) In general.

Question of whether evidence relates to indicted conspiracy, rather than to separate, unrelated conspiracy, is one of fact which should ordinarily be left for jury; so long as potential witness can identify key details and individuals in indictment conspiracy, thus establishing "general knowledge of the overall goals" of conspiracy, witness' proffered evidence should be admitted, unless on specific facts of particular case proffered evidence fails to meet relevance/prejudice balancing test. Fed.Rules Evid.Rules 104(b), 403, 28 U.S.C.A.

3. CRIMINAL LAW k338(7)
110XVII Evidence
110XVII(D) Facts in Issue and Relevance
110k338(7) Evidence calculated to create prejudice against or sympathy for accused.

Exclusion of portion of defense witness' exculpatory testimony about drug conspiracy, to effect that he had not encountered defendants in connection with his smuggling activities with prosecution witnesses, was not abuse of discretion, based on district court's determination that certain importation dates to which defense witness testified concerned unrelated conspiracy with prosecution witnesses separate from indicted conspiracy and that its probative value was substantially outweighed by its potential for prejudice. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

4. CONSPIRACY k45
91II Criminal Responsibility
91k44 Evidence
91k45 Admissibility in general.

Portion of defense witness' exculpatory testimony in drug conspiracy prosecution, to effect that he had not encountered defendants in connection with his smuggling activities with prosecution witnesses, could not be excluded on basis that it constituted extrinsic evidence of specific actions offered for purpose of impeaching government witnesses' character; defense witness' proffered testimony was directly relevant to material issue of defendants' alleged participation in smuggling operations and, as such, it was more than evidence offered to impeach credibility of government witnesses. Fed.Rules

Evid.Rule 608(b), 28 U.S.C.A.

5. CRIMINAL LAW k369.2(1)
110XVII Evidence
110k369 Other Offenses as Evidence of Offense Charged in General
110k369.2 Evidence Relevant to Offense, Also Relating to Other Offenses in General
110k369.2(1) In general.

Extrinsic evidence of unindicted bad acts is admissible if evidence is relevant to issue other than defendant's character and probative value of evidence is not substantially outweighed by its potential for causing undue prejudice. Fed.Rules Evid.Rule 404, 28 U.S.C.A.

6. CRIMINAL LAW k371(1)
110XVII Evidence
110k371 Acts Showing Intent or Malice or Motive
110k371(1) In general.
110k673(5) Limiting effect of evidence of other offenses.

Extrinsic evidence of past bad acts is admissible to establish intent, provided judge offers limiting instruction to jury to effect that evidence may not be used to establish that defendant acted in conformity with past behavior. Fed.Rules Evid.Rule 404, 28 U.S.C.A.

7. CRIMINAL LAW k371(1)
110XVII Evidence
110k371 Acts Showing Intent or Malice or Motive
110k371(1) In general.
110k661 Necessity and scope of proof.

Extrinsic evidence about prior, uncharged drug smuggling activities was admissible in drug smuggling conspiracy prosecution for purpose of establishing defendants' intent, where defendants did not affirmatively take issue of intent out of contention by stipulating that they possessed requisite intent, and probative value of evidence was not outweighed by its prejudicial effect. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

8. CRIMINAL LAW k369.2(1)
110XVII Evidence
110k369 Other Offenses as Evidence of Offense Charged in General
110k369.2 Evidence Relevant to Offense, Also Relating to Other Offenses in General
110k369.2(1) In general.

Other crimes evidence must be actually necessary to establish material element of Government's case in order that probative value of extrinsic evidence not be outweighed by its prejudicial effect. Fed.Rules Evid.Rules 403, 404(b), 28 U.S.C.A.

9. INDICTMENT AND INFORMATION k127
210VI Joinder
210k126 Joinder of Counts; Multiplicity
210k127 In general.

In order to avoid multiplicity, only one fact or element need be different between each charge.

10. CRIMINAL LAW k29(8)
110I Nature and Elements of Crime
110k29 Different Offenses in Same Transaction
110k29(5) Particular Offenses

110k29(8) Drugs and narcotics offenses.

Three convictions for importing cocaine did not constitute multiplicitous convictions for same offense, even if *919 cocaine started as one load and ultimately wound up in United States as one lump, where three separate boat loads came into Florida; indictment did not make one importation charge for entire quantity of cocaine, and Government was free to charge defendants with importing three distinct quantities of cocaine in three separate vessels. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1002, 21 U.S.C.A. § 952; U.S.C.A. Const.Amend. 5.

11. WITNESSES k270(2)

410III(B) Cross-Examination

410k270 Cross-Examination as to Irrelevant, Collateral, or Immaterial Matters

410k270(2) Particular matters as subjects of cross-examination.

Defendants were not denied their Sixth Amendment right to cross-examine prosecution witness when they were prohibited from quizzing him on his views of criminal justice system and on justice of his conviction, where court allowed cross-examination on all material issues, including information regarding his plea agreement, for information about his involvement in drug conspiracy, and for bias. U.S.C.A. Const.Amend. 6.

12. PARDON AND PAROLE k54

284k48 Eligibility for Parole or Parole Consideration

284k54 Sentence provisions; judge's recommendations.

District court had sentencing authority in preguidelines

case to specify that defendant not be eligible for parole until he served at least one third of his sentence. 18 U.S.C.(1982 Ed.) § 4205(b)(1).

13. CRIMINAL LAW k665(4)
110XX(C) Reception of Evidence
110k665 Separation and Exclusion of Witnesses
110k665(4) Enforcement of rule.

Evidence supported district court's determination that prosecution witnesses did not breach court's sequestration order. Fed.Rules Evid.Rule 615, 28 U.S.C.A.

14. CRIMINAL LAW k977(1)
110k977 Power and Duty of Court in General
110k977(1) In general.

Defendant was not entitled to judgment of acquittal based upon inconsistent testimony given by government witnesses where their testimony was far from irreconcilable and differences in testimony did not establish defendant's innocence. Fed.Rules Cr.Proc.Rule 29, 18 U.S.C.A.

***921** Arthur Joel Levine, Adler & Cops, Philadelphia, Pa., for Perry.

Peter Raben, Coconut Grove, Fla., for Costa.

Sheryl J. Lowenthal, Coral Gables, Fla., for Nunez.

Paul Morris, Coral Gables, Fla., for Blucher.

Karen L. Atkinson, Kathleen Salyer, Linda Collins Hertz, Asst. U.S. Attys., Miami, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before FAY, Circuit Judge, JOHNSON (FN*), Senior Circuit Judge and MERHIGE (FN**), Senior District

Judge.

JOHNSON, Senior Circuit Judge:

This case arises on appeal following the appellants' convictions on drug trafficking charges. Because the appellants have failed to establish any errors below justifying reversal, we affirm the appellants' convictions.

I. STATEMENT OF THE CASE

A. *Background Facts*

Between January and July 1985, a group of south Florida smugglers, allegedly including appellants Costa, Nunez, and Perry, imported cocaine from the Bahamas into Florida. The smugglers made at least four trips over the course of six months, bringing over 1,800 kilograms of cocaine into the United States.

The group picked up cocaine flown to the Bahamas from Colombia, loaded the cocaine aboard boats in the Bahamas, and sailed to south Florida with their cargo, where the cocaine was unloaded and delivered to distributors. United States Customs agents discovered the June load.

B. *Procedural History*

On March 3, 1987, a federal grand jury indicted fourteen individuals on various charges including conspiracy to import cocaine, importation of cocaine, conspiracy to possess cocaine with intent to distribute, and possession of cocaine with intent to distribute. On May 12, 1987, the grand jury issued a superseding indictment naming one additional defendant. On August 30, 1987, the grand jury issued a second superseding indictment naming four more individuals. Appellants Costa, Nunez, and Perry were first named in the second superseding indictment. Costa, Nunez, and Perry were all charged in

count I with conspiring to import cocaine between November 1984 and July 1985, in violation of 21 U.S.C.A. § 963 (1981), and in count II with conspiracy to possess cocaine with intent to distribute between November 1984 and July 1985, in violation of 21 U.S.C.A. § 846 (1981). Costa and Nunez were charged in counts IV, V, VII, and IX with the importation of cocaine related to drug importations in January and February of 1985, in violation of 21 U.S.C.A. § 952(a) (1981) and 18 U.S.C.A. § 2 (1969). Nunez was also charged in counts III and X with possession of cocaine with intent to distribute ***922** in violation of 21 U.S.C.A. § 841(a) (1981) and 18 U.S.C.A. § 2. Finally, Perry was charged in counts VIII and XV with possession of cocaine with intent to distribute in violation of 21 U.S.C.A. § 846.

All but six of the nineteen persons indicted pled guilty to the charges. However, appellants Costa, Nunez, and Perry were among those who pled not guilty and proceeded to trial. After a six week trial, a jury found Costa and Nunez guilty on all counts. Perry was found guilty on counts II, VIII, and XV and not guilty on count I.

The district court sentenced all three defendants to terms well within the statutory limits for the relevant crimes. (FN1) Finally, the lower court, pursuant to 18 U.S.C.A. § 4205(b)(1) (1976), ordered that Costa would not be eligible for parole until he served one-third of his sentence. Defendants Costa, Nunez, and Perry now bring a direct appeal of their criminal convictions before this Court.

II. ISSUES PRESENTED

Appellants raise nine issues on appeal. Three of these issues merit close examination and discussion by this

Court. First, Costa, Nunez, and Perry all allege that the district court abused its discretion by limiting the testimony of defense witness Roger Furbee. Second, Costa and Nunez claim that the district court abused its discretion by admitting extrinsic evidence of unindicted offenses related to drug smuggling. Finally, Costa and Nunez challenge their conviction on three counts of importing cocaine in the January 1985 importation, claiming that convictions on all three counts constituted impermissible multiplicity. The remaining six issues raised by the appellants do not warrant extended discussion and will be addressed summarily.

III. ANALYSIS

A. *Partial Exclusion of Roger Furbee's Proffered Testimony*

All three appellants claim that the district court erred when it limited defense witness Roger Furbee's testimony. Furbee would have testified that, although he imported cocaine in February, March, and June of 1985 with three of the government's witnesses (Ellsworth, Hanlon, and Roloff), he had never seen or heard of appellants in connection with his smuggling. Furbee's testimony would have tended to show that the defendants were not, in point of fact, engaged in the smuggling operation. Because the only evidence linking the defendants to the importation phase of the operation was the testimony of government witnesses, the exclusion of significant portions of Furbee's testimony cannot be lightly dismissed.

The district court, after hearing Furbee's testimony outside the presence of a jury, held that Furbee could testify about the June 1985 shipment, but prohibited him from testifying about the two other shipments in which he

participated and his "standby status" for the January load. We review the district court's decision to exclude a significant portion of Furbee's proffered testimony under the abuse of discretion standard of review. *Richardson v. McClung,* 559 F.2d 395, 396 (5th Cir.1977). *See also United States v. Beechum,* 582 F.2d 898, 915 (5th Cir.1978) (en banc), *cert. denied,* 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979).

The district court reached its decision to bar Furbee's exculpatory testimony under two separate analyses. The court found, sua sponte, that Furbee's involvement with Ellsworth related to a different conspiracy than the one alleged at trial. The court based this finding of unrelated conspiracies on Furbee's inability to recall certain details regarding the boats used to import the cocaine and on differences in Furbee's recollection of the operations from the descriptions provided by the other conspirators. The district court held that admission of Furbee's testimony regarding importations other than the June importation would tend to confuse the jury because the testimony related to a second conspiracy, and therefore that its admission would violate Federal ***923** Rule of Evidence 403. (FN2) The court also analyzed Furbee's proffered testimony under Rule 608(b). (FN3) The district court reasoned that the defense was attempting to impeach the general credibility of Ellsworth, Hanlon, and Roloff with extrinsic evidence of specific instances of misconduct unrelated to the conspiracy at issue. Rule 608(b) "prohibits the use of extrinsic evidence merely to impeach the general credibility of a witness." *United States v. Calle,* 822 F.2d 1016, 1021 (11th Cir.1987). Thus, the trial court's characterization of Furbee's proffered

testimony barred its introduction: Because the court found that Furbee was involved in a separate conspiracy, it analyzed his testimony under Rule 608(b) rather than Rules 401 and 402, and applied Rule 403 to exclude Furbee's testimony regarding the February and March shipments.

Although we are concerned by the lower court's Rule 403 ruling, we are not prepared to hold that it constituted an abuse of discretion by the trial court. The abuse of discretion standard imposes a heavy burden on the party seeking to reverse a district court's evidentiary ruling. *See Balogh's of Coral Gables, Inc. v. Getz,* 798 F.2d 1356, 1358 (11th Cir.1986) (en banc). This is so for a good reason--the trial court is in the best position to evaluate the credibility of witnesses and the relevance and probity of an evidentiary offering. *See United States v. Yellow Cab Co.,* 338 U.S. 338, 341-42, 70 S.Ct. 177, 179-80, 94 L.Ed. 150 (1949). This Court may reverse a district court's evidentiary ruling only if it maintains a "definite and firm conviction that the [trial] court made a clear error of judgment based upon a weighing of the relevant factors." *Balogh's of Coral Gables, Inc.,* 798 F.2d at 1358. Although the appellants' contentions regarding the exclusion of some of Furbee's proffered testimony presents a close question, we are ultimately unpersuaded that the district court should be reversed.

[1] Our analysis of whether the lower court abused its discretion begins with the observation that the law of this Circuit strongly favors admitting evidence that may or may not relate to the indicted conspiracy and allowing the jury to decide whether the evidence relates to the conspiracy at issue (and thus is relevant evidence) or whether it relates to

a separate and unrelated conspiracy (and, consequently, is irrelevant). *United States v. Gonzalez,* 940 F.2d 1413, 1422 & 1422 n. 17 (11th Cir.1991). A district court should, in most circumstances, admit such evidence with a Rule 104(b) (FN4) limiting instruction to the effect that the jury may consider the evidence only if it finds that the evidence relates to the indicted conspiracy. The jury, as the ultimate finder of fact, should be provided with all relevant information, especially when such information bears upon the ultimate guilt or innocence of the accused. (FN5)

[2] Based on Furbee's testimony, it was possible, although not certain, that Furbee was acting as part of the same conspiracy in which the defendants allegedly participated. The trial court, in order to exclude portions of Furbee's testimony under Rule 403 because of a danger of jury confusion, had to find that the evidence established convincingly that Furbee's proffered testimony related to a conspiracy different ***924** from the indicted conspiracy. *See Gonzalez,* 940 F.2d at 1422. According to *Gonzalez,* the question of whether evidence relates to the indicted conspiracy is one of fact that should normally be left for the jury. (FN6) *Id.; see also* Fed.R.Evid. 104(b). So long as a potential witness can identify key details and individuals in the indicted conspiracy, thus establishing "general knowledge of the overall goals" of a conspiracy, the witness' proffered evidence should be admitted, unless on the specific facts of a particular case proffered evidence fails to meet the relevance/prejudice balancing test mandated by Rule 403. *See Gonzalez,* 940 F.2d at 1422.

[3] Were this panel conducting a *de novo* review of the district court's ruling, we would probably admit all of

Furbee's proffered testimony. Based on the record before us, Furbee's testimony appears to be of the sort that, under *Gonzalez,* is properly left for the jury to consider. *Gonzalez,* 940 F.2d at 1422. The application of Rule 403 in conspiracy cases to exclude potentially relevant evidence (whether offered by a defendant or the government) because it might cause jury confusion will usually be inconsistent with the general rule favoring the admission of such evidence and allowing the jury to decide if it relates to the indicted conspiracy. (FN7)

This Court's role, however, is limited to reviewing the district court's determination for abuse of discretion. In this case, we are not prepared to say that a reasonable district court could not come to a conclusion contrary to our own without abusing its discretion. This Court has emphasized that "the trial judge is accorded the broadest discretion in determining whether evidence should be excluded under Rule 403." *Borden, Inc. v. Florida East Coast Ry. Co.,* 772 F.2d 750, 756 (11th Cir.1985). Despite our sincere concerns for the general presumption of admissibility of the kind of evidence at issue reflected in *Gonzalez,* we nevertheless conclude, giving the district court the "broadest discretion," that the lower court's Rule 403 ruling may stand. The district court heard Furbee's testimony and was in the best position to make the credibility determination that necessarily factors into a Rule 403 analysis. (FN8) We therefore affirm the district court's evidentiary ruling. We nevertheless caution the lower courts that the exclusion of potentially exculpatory evidence in conspiracy cases under Rule 403 should be the exception rather than the rule. Exclusion of evidence under Rule 403 is an unusual occurrence, and this is

doubly so in circumstances where the presumption is that the jury has the right to decide the evidentiary question of whether the evidence relates to the indicted conspiracy. *Gonzalez,* 940 F.2d at 1422.

[4] The district court also characterized Furbee's testimony as extrinsic evidence of specific actions offered for the purpose of impeaching the government witnesses' character, and held the evidence inadmissible under Rule 608(b). We reject this portion ***925** of the district court's analysis. A trial judge's discretion "does not extend to the exclusion of crucial relevant evidence establishing a valid defense." *United States v. Wasman,* 641 F.2d 326, 329 (5th Cir.April 1981). With regard to the lower court's application of Rule 608(b), we observe that even if Furbee's proffered evidence was extrinsic, because it also "contradict[ed] material testimony ... it [was] relevant evidence and [could] no longer [be] considered collateral." *United States v. Russell,* 717 F.2d 518, 520 (11th Cir.1983). As this Court has explained, "[e]xtrinsic evidence of a witness' prior misconduct should be excluded where that evidence is probative only of the witness' general propensity for truthfulness; such evidence should be admitted, however, where it is introduced to disprove a specific fact material to the defendant's case." *United States v. Calle,* 822 F.2d at 1021. Furbee's proffered testimony was directly relevant to the material issue of the appellants' alleged participation in the smuggling operations. As such, it was more than evidence offered to impeach the credibility of the government's witnesses and could not be excluded under a Rule 608(b) analysis. Thus, we must reject the lower court's characterization of Furbee's testimony as mere character evidence. However,

this does not affect the resolution of this case, because the district court's determination that Furbee's testimony failed Rule 403's prejudice balancing test is, by itself, sufficient to justify the district court's evidentiary ruling excluding portions of Furbee's proffered testimony.

B. *Admission of Extrinsic Evidence of Prior Drug Smuggling*

The lower court allowed government witnesses to testify about prior, uncharged drug smuggling activities involving Nunez and Costa. Rule 404 prohibits the admission of extrinsic evidence of misconduct, except as provided in Rule 404(b). The lower court held that the evidence was admissible for the legitimate purpose, under Rule 404(b), of establishing intent, a material element of the conspiracy charge. Nunez and Costa claim that the extrinsic evidence should not have been admitted, because it was prejudicial and they did not specifically challenge the existence of intent. This contention is without merit.

[5][6] In this Circuit, extrinsic evidence of unindicted bad acts is admissible if the evidence is relevant to an issue other than the defendant's character and the probative value of the evidence is not substantially outweighed by its potential for causing undue prejudice. *United States v. Hewes,* 729 F.2d 1302, 1314 (11th Cir.1984), *cert. denied sub nom.,* 469 U.S. 1110, 105 S.Ct. 790, 83 L.Ed.2d 783 (1985). Conspiracy was one of the substantive offenses at issue. One of the elements of conspiracy that the prosecution must establish beyond a reasonable doubt is an intention to further the purposes of the conspiracy. Extrinsic evidence of past bad acts is admissible to establish intent, provided the judge offers a limiting instruction to the jury to the effect that the evidence may

not be used to establish that the defendant acted in conformity with the past behavior. Fed.R.Evid. 404(b). *See United States v. Miller,* 883 F.2d 1540, 1544 n. 4 (11th Cir.1989), *vacated pending en banc review,* 923 F.2d 158 (11th Cir.1991).

[7] The appellants claim that they never specifically "put intent at issue," and therefore that the government could not rely on intent as a basis for the admission of the evidence. However, "[t]he law in this Circuit provides that intent becomes a material issue whenever a defendant pleads not guilty to a charge of conspiracy unless the defendant affirmatively withdraws the element of intent from the case." *United States v. Hernandez,* 896 F.2d 513, 523 (11th Cir.), *cert. denied,* --- U.S. ----, 111 S.Ct. 159, 112 L.Ed.2d 125 (1990). Because the defendants did not affirmatively take the issue of intent out of contention by stipulating that they possessed the requisite intent, the district court did not abuse its discretion in admitting evidence of unindicted extrinsic bad acts. *United States v. Cardenas,* 895 F.2d 1338, 1342 (11th Cir.1990).

[8] ***926** The second step for reviewing extrinsic evidence relates to whether the probative value of the evidence is outweighed by its prejudicial effect. The law in this Circuit requires that the Rule 404(b) evidence actually be necessary to establish the material element. *Hewes,* 729 F.2d at 1315-16. "The strength of the government's case is an important factor in determining the probative value of the extrinsic evidence. Extrinsic evidence is only relevant if it has a tendency to prove a fact that is at issue; thus, if the government's case is strong, there is no need for the evidence." *United States v. Miller,* 883 F.2d at 1545 n. 5. *See also Beechum,* 582 F.2d at 914

(strength of government's case a relevant factor when considering the probity of extrinsic bad acts evidence).

The government's case is not particularly strong on the issue of intent. Indeed, appellants in another argument suggest that the lower court's refusal to allow Furbee's testimony was sufficiently prejudicial to warrant a new trial because the government's only evidence of the appellants' participation in the conspiracy was testimonial. The appellants cannot now gainsay that the admission of the extrinsic evidence was unnecessary because the government's case was sufficiently strong without it. Therefore, we hold that the district court did not abuse its discretion in admitting the extrinsic evidence of unindicted bad acts.

C. *The Three Importation Charges*

Costa and Nunez challenge their conviction on three counts of importing cocaine in the January 1985 importation. They argue that because the load started in one lump in the Bahamas and ultimately wound up as one lump in Florida, the fact that it actually came into the United States on three boats is irrelevant. Costa and Nunez claim that the three convictions for importing cocaine constitute multiplicitous convictions for the same offense. This argument lacks merit.

[9][10] Although this court has condemned multiplicity when it exists, it does not exist on these facts. The government alleged conspiracy and three counts of importation. In order to avoid multiplicity, only one fact or element need be different between each charge. *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). Section 952 of Title 21 criminalizes the importation of cocaine into the United

States. 21 U.S.C.A. § 952. Nothing in the statute suggests that one should aggregate the amount of drugs from the point of origin to the point of ultimate destination. (FN9) Rather, as each boat entered the territorial waters of the United States, the particular crew violated § 952. Because the importations were incident to a conspiracy, all members of the conspiracy are vicariously liable for each independent act in furtherance of the conspiracy. *Pinkerton v. United States,* 328 U.S. 640, 643-44, 646-47, 66 S.Ct. 1180, 1181-82, 1183-84, 90 L.Ed. 1489 (1946).

Appellants claim that *United States v. Fiallo-Jacome,* 784 F.2d 1064 (11th Cir.1986), supports their contention that sentences for these acts of importation are multiplicitous. *Fiallo-Jacome* held that when a defendant is convicted of possession of a specific amount of contraband over a period of time, the defendant may not also be convicted with possession of some portion of the same contraband on a specific date. *Id.* at 1066-67. The indictment in *Fiallo-Jacome* alleged possession over a four month period and then again on a specific date; the court concluded that Fiallo possessed the cocaine continuously, and could not be convicted twice for the same act of possession. On the present facts, the appellants were charged with three counts of importation and with a single count of conspiracy to import the entire amount. The conspiracy count does not merge with the importation counts, nor do the importation charges count the same quantity of cocaine twice. Thus, the appellants cannot avail themselves of the *Fiallo-Jacome* ***927** rule. This conclusion is consistent with this Court's clarification of *Fiallo-Jacome* in *United States v. Maldonado,* 849 F.2d 522 (11th Cir.1988). The *Maldonado* court held that there

was no multiplicity where Maldonado was convicted on two counts of possession because the counts did not charge Maldonado twice for possessing the same quantity of cocaine. *Id.* at 524. Likewise, because the indictment in the present case did not make an importation charge for the entire quantity of cocaine, the government was free to charge the appellants with importing three distinct quantities of cocaine in three separate vessels. *See United States v. Vaughan,* 859 F.2d 363, 865 (11th Cir.1988) (emphasizing that *Fiallo-Jacome* involved double charging for same quantity of drug), *cert. denied,* 490 U.S. 1065, 109 S.Ct. 2064, 104 L.Ed.2d 629 (1989).

D. *The Appellants' Remaining Six Claims*

Costa, Nunez, and Perry raise six additional arguments, none of which merits extended discussion. However, because the appellants have seen fit to raise them, this Court will address each specific claim.

[11] All three appellants object to the district court's restrictions on the cross examination of government witness Ellsworth. The district court prohibited the appellants from quizzing Ellsworth on his views on the criminal justice system in general and the justice of his conviction in particular. The court allowed cross-examination for information regarding Ellsworth's plea agreement, for information about his involvement in the conspiracy, and for bias. Thus, the district court provided the defendants with the opportunity to cross-examine Ellsworth on any material issue. On these facts, there is no colorable claim that the court denied defendants their Sixth Amendment right to cross examine adverse witnesses. *United States v. Beale,* 921 F.2d 1412, 1424 (11th Cir.), *cert. denied,* --- U.S. ----, 112 S.Ct. 100, 116

L.Ed.2d 71 (1991).

[12] Costa objects to the district court's order that he not be eligible for parole until he serves at least one third of his sentence (20 years). The district court made this order pursuant to 18 U.S.C.A. § 4205(b)(1), which provides that a court may "designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court." This court in *United States v. Berry,* 839 F.2d 1487 (11th Cir.1988), *cert. denied,* 488 U.S. 1040, 109 S.Ct. 863, 102 L.Ed.2d 987 (1989), held that § 4205 allowed a district court to either advance or postpone parole eligibility. *Id.* at 1488-89. Consequently, this argument is without merit.

[13] Nunez appeals the lower court's failure to find a violation of the court's Federal Rule of Evidence 615 sequestration order based on an out-of-court conversation between two government witnesses (Roberto and Ellsworth). The district court heard testimony on the alleged breach of its sequestration order, but concluded that the evidence did not support a finding that government witnesses Roberto and Ellsworth breached the order. Having made a factual finding that the order was not breached, the district court declined to call a mistrial, strike the witnesses' testimony, or instruct the jury that the witnesses violated the order. The court did, however, allow Perry to cross-examine the witnesses about any conversations that they may have had during the pendency of the trial. The court did not allow Nunez to assert to the jury that the witnesses had violated the order, but did allow Nunez's counsel to tell the jury that the two witnesses had

talked with each other about matters related to the pending case. (FN10) Because Nunez presents no evidence suggesting that the ***928.** district court was clearly erroneous in finding that the witnesses did not breach the court's order, this Court will defer to the lower court's handling of this problem.

[14] Appellant Perry argues that because the testimony regarding her involvement given by two government witnesses was not entirely consistent, she should have been acquitted pursuant to Federal Rule of Criminal Procedure 29. (FN11) The witnesses' testimony was far from irreconcilable and to the extent there were differences they did not establish Perry's innocence. The court correctly rejected Perry's Rule 29 motion.

Perry and Nunez challenge the length of their sentences as being disproportionate to those given to other indictees in the conspiracy who pled guilty. However, "[a] sentencing judge has broad discretion in the imposition of criminal sentences." *United States v. Restrepo,* 832 F.2d 146, 148 (11th Cir.1987). The sentences at issue were all well within the statutorily authorized range. "As long as the sentence is within statutory limits and there is no showing of arbitrary and capricious action amounting to an abuse of discretion, it will not be questioned on appeal." *United States v. Ard,* 731 F.2d 718, 727 (11th Cir.1984). This point lacks merit because the sentences were within the statutory limits and the appellants have produced no evidence suggesting that the district court acted arbitrarily and capriciously.

Finally, Perry asks for a reversal and a remand because the court admitted a "brown box" containing cocaine into evidence at trial. The cocaine found on the boat was in

yellow and blue bags. Counsel for the United States explains that the brown box contained nine packages of cocaine and was merely used to carry the cocaine into the courtroom. The parties stipulated that the government discovered 163 packages of cocaine weighing 360 pounds on the seized boat. Moreover, Perry made no objection to the admission of the brown box at trial. This point is utterly without merit.

IV. CONCLUSION

For the foregoing reasons, the criminal convictions of appellants Costa, Nunez, and Perry are AFFIRMED.

FN* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

FN** Honorable Robert R. Merhige, Jr., Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

FN1. Sentencing in this case predated the federal sentencing guidelines.

FN2. Rule 403 requires the exclusion of relevant evidence if its probative value is "substantially outweighed" by the evidence's tendency to cause undue prejudice. Fed.R.Evid. 403.

FN3. Rule 608(b) prohibits the impeachment of a witness through extrinsic evidence, other than convictions, of specific instances of misconduct. Fed.R.Evid. 608(b).

FN4. Rule 104(b) provides that: Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

FN5. In the case *sub judice,* Furbee's proffered testimony would have tended to exculpate appellants. If Furbee was an active participant with several of the principals in the conspiracy and imported cocaine into the United States with them on several occasions, then evidence that Furbee did not know the defendants would tend to establish their lack of participation in the importation phase of the conspiracy and thus their innocence.

FN6. This approach is entirely consistent with the law of this Circuit holding that "[a] single conspiracy does not become many simple because of the changing composition of the personnel comprising the conspiracy or because some members performed only a single function." *United States v.*

Meester, 762 F.2d 867, 880 (11th Cir.), *cert. denied sub nom.*, 474 U.S. 1024, 106 S.Ct. 579, 88 L.Ed.2d 562 (1985).

FN7. This is not to say that in a particular case a district court is precluded from finding that the relevance of specific evidence that may relate to the indicted conspiracy is "substantially outweighed" by its potential for prejudice. Fed.R.Evid. 403. Rule 403 can and should be used to bar the admission of evidence when its admission would interfere with the jury's ability to decide a case fairly.

FN8. The district court doubted Furbee's veracity, and believed that his recollections of the details of the conspiracy were sufficiently poor so as to raise substantial doubts as to whether his testimony related in any way to the indicted offense. These findings justified the exclusion of the evidence under Rule 403. Moreover, such findings are essentially factual determinations, which this Court will not reconsider unless clearly erroneous. The appellants have presented this Court no additional evidence suggesting that Furbee's familiarity with the details of the conspiracy was more substantial than the district court found it to be. Consequently, this Court has no basis from which to infer that the lower court's factual findings regarding the depth of Furbee's knowledge of the conspiracy were clearly erroneous.

***928_** FN9. Were this argument to hold true, then even if the cocaine were smuggled into the United States at different locations via various means of transportation, there should be only one violation of § 952 provided that the smugglers are careful about ultimately reaggregating their goods.

FN10. Nunez's argument lacks merit given the court's finding that the order was not violated. Cross-examination is one of the three remedies provided for violations of sequestration orders, although it must usually be accompanied by a court statement to the jury that the sequestration order was violated. *United States v. Lattimore,* 902 F.2d 902, 904 (11th Cir.), *cert. denied,* --- U.S. ----, 111 S.Ct. 272, 112 L.Ed.2d 228 (1990).

FN11. Rule 29. Motion for Judgment of Acquittal

(a) Motion Before Submission to Jury.

Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of [sic] its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-5874

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MANUEL COSTA,
RENE TOTORICA NUNEZ,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
Before: FAY, Circuit Judge, JOHNSON*, Senior Circuit Judge and MERHIGE**, Senior District Judge.
PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____
UNITED STATES CIRCUIT JUDGE
Entered: January 27, 1992 ORD-42(9/91)

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113 S.Ct. 360, 506 U.S. 929, 121 L.Ed.2d 272

Manuel COSTA, petitioner,
v.
UNITED STATES.
No. 91-1849.

Supreme Court of the United States

October 13, 1992

Case below, 947 F.2d 919.

On petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

The petition for writ of certiorari is denied.

Justice WHITE, with whom Justice O'CONNOR joins, dissenting.

Petitioner Costa was convicted on various drug trafficking charges and sentenced to 60 years in prison. The District Court ordered that he would not be eligible for parole until he served one-third of his sentence (20 years). Before the Eleventh Circuit, petitioner argued that this latter provision violated 18 U.S.C. § 4205(a), which states that the maximum term of imprisonment prior to parole eligibility generally is (1) one-third of a sentence for a term of years, or (2) 10 years of a life sentence and of a sentence

of more than 30 years.

The Court of Appeals rejected this argument, relying on § 4205(b)(1), which provides that a district court may "designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court." 947 F.2d 919 (1991).

The Courts of Appeals have interpreted the interplay between subsections (a) and (b)(1) of the statute in conflicting ways. In holding that § 4205(b)(1) authorizes the sentencing court to disregard the 10-year ceiling for parole eligibility in § 4205(a), the Eleventh Circuit joined the Fifth, Ninth, Eighth, and Tenth Circuits. See *United States v. Varca,* 896 F.2d 900, 905-906 (CA5), cert. denied, 498 U.S. 878, 111 S.Ct. 209, 112 L.Ed.2d 170 (1990); *United States v. Gwaltney,* 790 F.2d 1378, 1388-1389 (CA9 1986), cert. denied, 479 U.S. 1104, 107 S.Ct. 1337, 94 L.Ed.2d 187 (1987); *Rothgeb v. United States,* 789 F.2d 647, 651-653 (CA8 1986); *United States v. O'Driscoll,* 761 F.2d 589, 595-598 (CA10 1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1207, 89 L.Ed.2d 320 (1986); see also *United States v. Berry,* 839 F.2d 1487 (CA11 1988), cert. denied, 488 U.S. 1040, 109 S.Ct. 863, 102 L.Ed.2d 987 (1989). Firmly to the contrary are the First, Third, Sixth, and Seventh Circuits, which have held that § 4205 imposes a 10-year maximum before parole eligibility. Under this view, the purpose of subsection (b) was to allow judges to *reduce,* not to *extend,* the preparole eligibility period. See *United States v. Castonguay,* 843

F.2d 51, 56 (CA1 1988); *United States v. DiPasquale,* 859 F.2d 9, 13 (CA3 1988); *United States v. Hagen,* 869 F.2d 277 (CA6), cert. denied, 492 U.S. 911, 109 S.Ct. 3228, 106 L.Ed.2d 576 (1989); *United States v. Fountain,* 840 F.2d 509, 521 (CA7), cert. denied, 488 U.S. 982, 109 S.Ct. 533, 102 L.Ed.2d 564 (1988).

Although the statute was repealed as of November 1, 1987, by the Sentencing Reform Act of 1984, it remains applicable to crimes committed before that date. As ***361.** this case and others illustrate, the issue continues to arise. See *United States v. Faulkenberry,* 1992 U.S.App. LEXIS 14580 (CA9) (unpublished); *Frierson v. United States,* 1991 U.S.App. LEXIS 10310 (CA6) (unpublished); *United States v. Beale,* 921 F.2d 1412 (CA11), cert. denied, 502 U.S. 829, 112 S.Ct. 264, 116 L.Ed.2d 217 (1991); *United States v. Maravilla,* 907 F.2d 216, 229 (CA1 1990). I would grant certiorari to resolve this split between the Circuits.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-8021-CR-ZLOCH

UNITED STATES OF AMERICA,

v.

MANUEL COSTA
North Dade Detention Center
15801 N. State Road 9
Miami, FL
SS#261-13-7546

PAUL LAZARUS, ESQ.
Attorney for Defendant

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT ENTERED A PLEA OF:

THERE WAS A:
x verdict of guilty as to count(s) 1, 2, 4, 5, 7 and 9

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: Ct 1 -conspiracy to import a quantity of cocaine in excess of one kilogram - 21:963; Ct 2- conspiracy to possess with intent to distribute in excess of one kilogram of cocaine 21:846; Cts 4, 5, 7 & 9- importation of in excess of one kilogram of cocaine- 21:952(a), 960(a)(1) and 18:2.

IT IS THE JUDGMENT OF THIS COURT THAT: as to Count 1, the defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a period of 20 years.

IT IS ADJUDGED as to Count 2, the defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a period of 20 years. Counts 1 and 2 are to run concurrently with each other.

IT IS FURTHER ADJUDGED as to Count 4, the defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a period of 10 years.

As to Count 5, the defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a period of 10 years.

As to Count 7, the defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a period of 10 years.

As to Count 9, the defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a period of 10 years.

Said sentence on Counts 4, 5, 7 and 9 are to run consecutively to each other and consecutively to the

sentence on Counts 1 and 2.

Pursuant to 18 U.S.C. Section 4205(a) and 4205(b)(1) the Court noting the amount of cocaine brought into this country by the defendant, the Court finds that the ends of justice and best interest of the public require that pursuant top Section 4205(a) the defendant COSTA shall not ne eligible for parole until serving one third of the 60 years or 20 years.

Bond, if any, is hereby exonerated.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:
(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law enforcement officer;
(2) associate only with law abiding persons and maintain reasonable hours;
(3) work regularly at a lawful occupation and support your legal dependants, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);
(4) not leave the judicial district without permission of the probation officer;
(5) notify your probation officer immediately of any changes in your place of residence;
(6) follow the probation officer's instructions and report as directed.
The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $300.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) 1, 2, 4, 5, 7 and 9 as follows: payable immediately to Clerk, U.S. District Court.

IT IS FURTHER ORDERED that the defendant shall pay

to the United States attorney for the district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States Marshal of this district.

8/11/89
Date of Imposition of Sentence

Signature of Judicial Officer

WILLIAM J. ZLOCH, U.S. DISTRICT COURT

8/14/89
Date